FILE COPY

No. 265

IN THE

Supreme Court of the United States

OCTOBER TERM, 1935

UNITED STATES OF AMERICA,
Petitioner,

VS.

RAY KEITH ATKINSON,
Respondent.

ON WRIT OF CERTIORARI TO
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT

A. H. CULWELL,
JOHN M. WORRELL,
R. A. D. MORTON,
El Paso, Texas
Attorneys for Respondent

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TO THE HONORABLE SUPREME COURT:

QUESTION PRESENTED

The real question (if properly presented here) is, whether under the several statutes applicable, paragraph 11 (a) of Government Converted Insurance, providing that

> "permanent loss of hearing of both ears * * * * shall be deemed to be total permanent disability,"

is valid.

STATEMENT OF THE CASE

The statement of the case as made by petitioner is correct insofar as it goes, but it is desired to supplement same by adding the following:

Your respondent cannot hear conversation without the ear

phone. He can read lips to some extent, but cannot carry on an intelligent conversation by lip reading alone. The only way he understands talk is a combination between catching the sound by the ear phone and seeing the word spoken by the lips. The ear phone is operated by a battery and if he were required to work eight hours a day using his ear phone he would require about sixteen batteries a day, which cost seventy-five cents each (R 30). The requested charges made by the defendant on the trial speak for themselves and appear in the record (R 81-83).

There was no intimation even of a request to instruct the issue of total and permanent disability in fact out of the case, and further there was no intimation whatever of any attack on the validity of Section 11 (a) in the requested charges, or otherwise in the trial court.

In fact the Government admits in a note at page 2 of its brief that the question it presents here was not raised in the trial court.

The trial court (R-88) instructed in effect that the jury should consider whether even with the use of the ear phone plaintiff was able to secure and retain employment.

ARGUMENT

A. The Question sought to be presented is not properly before the Court.

Under the statements made by petitioner and respondent it will appear that no question was made as to the validity of Paragraph 11 (a) of the Policy in the trial court, but that an attack thereon was first made on the appeal. The Court instructed the jury as to total and permanent disability in fact, as well as on Paragraph 11 (a), and the verdict was:

> "We, the jury find for the plaintiff, that he became totally and permanently disabled December 1st, 1932." (R-7).

In this situation we submit that the question sought to be

presented not having been raised in the trial court, that all the courts below should be affirmed as the verdict should be attributable in any event to and upheld on any state of facts warranted under the evidence, and there being substantial evidence that plaintiff was totally and permanently disabled in fact, the verdict should not be disturbed.

That proceedings below are presumed correct, see:

Fairmount Glass Works vs Cub Fork Coal Co, 287 U. S. 474: 77 L. Ed. 439;

Mercantile Trust Co. vs Hensey, 205 U. S. at 306: 51 L. Ed. 814.

That a point not presented on the trial and sought to be presented here as an after-thought will not be considered, see:

Southern Pine Lumber Co vs Ward, 208 U. S. 126: 52 L. Ed. 420;

Robinson vs Belt, 187 U. S. 50: 47 L. Ed. 69;

Minnich vs Gardner, 292 U. S. 48: 78 L. Ed. 1116.

Also the dissent in the Wuchter Case, 276 U. S. 13, cited by the petitioner.

B. Paragraph 11 (a) of the policy is valid.

The Act of October 6th, 1917, amending the War Risk Insurance Act was the beginning of this Government insurance and contains Sections 402 and 404, and except as to the time limit for conversion of the insurance, these sections have been re-enacted time and time again without substantial change, so far as any question here is concerned. (See Note 7, p. 11, Petitioner's Brief). All these Acts provided that the Government

> "shall grant insurance against the death or total permanent disability of any such person."

And it was provided that the Director,

> "shall promptly determine upon and publish the full and exact terms and condition of such contract of insurance."

Later it appears from 38 U. S. C. (Supp), Sections 11 and 11-e (b), Act of July 3, 1930, 46 Stat. 1016-1018, that the Administrator was substituted for the Director, and continued

in force all rules and regulations formerly in existence.

38 U. S. C. Sections 511, 512, 512-a, and 512-b relate to converted insurance and, among other things, provide that within a specified period all term insurance shall be converted without medical examination,

> "into such form or forms of insurance as may be prescribed by regulations and as the insured may request."

And also provides:

> "Provisions for maturity at certain ages, for continuous installments during the life of the insured or beneficiaries, or both, for refund of premiums, cash, loan, paid-up and extended values, dividends from gains and savings, and such other provisions for the protection and advantage of and for alternative benefits to the insured and the beneficiaries as may be found to be reasonable and practicable, may be provided for in the contract of insurance, or from time to time by regulations."

It also provides:

> "That no deduction shall be made for continuous installments during the life of the insured in case his total and permanent disability continues for more than 240 months."

Section 513 in part provides that when a person receiving total permanent benefits under converted insurance

> "recovers from such disability,"

that he may still continue his insurance in force under certain conditions.

Section 512-b directs the Director to include in converted insurance a provision whereby if insured is totally disabled for twelve months (four months, as amended in Act of July 3rd, 1930,) he shall be paid benefits at the same rate as if totally and permanently disabled under the conditions there stated. It is true it provides for additional premium for such benefits, but the reason therefor is clear because the law only provides for insurance for total and permanent disability or death, whereas the additional benefits under 512-b are clearly not within the law as it theretofore existed.

None of the statutes, or re-enactments thereof, as to con-

verted insurance define total and permanent disability, but under the statutes referred to we think it clear that Congress intended that converted insurance should cover total and permanent disability and that power was vested in the Director by regulation to provide for such disability and to define it. It was not only within the province of the Director to define the character of disability dealt with by the law, but in view of the lack of definition in the law, it would appear that it was imperative that the Director exercise the power of definition. We say this because, as above shown, the Act says

> the policy must provide, "for continuous installments during the life of the insured."

Certainly some limitation in the way of regulation or definition was necessary on this broad provision. Furthermore, it was contemplated by the Act, Section 513, above mentioned, that one thought to be totally and permanently disabled might recover, and hence that phrase was not used in its absolute sense, again showing a necessity for a definition.

Again, the Act, Section 443, provides that the Bureau shall

> "act on accepted actuarial principles to meet all liabilities under such insurance."

And we submit that this, considered with other provisions of the Act mentioned, evinces an intention on the part of Congress to give the Director wide latitude in prescribing the kinds, terms and conditions of such insurance, so as to be in line with company insurance, and the reports contain many cases containing clauses providing that the loss of certain faculties or members shall be considered total and permanent disability, as well as that if total disability continues for short specified periods such shall likewise be considered total and permanent so far as benefits are concerned.

Paragraph 11 (a) of the policy merely follows this practice and though respondent says that no policy has been found containing a clause relating to hearing, we do know that policies do contain such presumptive clauses as to other mem-

bers and since one in respondent's condition with respect to the sense of hearing is for all practical purposes so far as getting and holding a job is concerned totally and permanently disabled in fact, we therefore, submit that the paragraph is

"a reasonable and practicable"

provision and within the discretion of the Director to make.

In Lumbra vs U. S., 290 U. S. 551: 78 L. Ed. 492, the regulation defining general total and permanent disability was under discussion and while it was pointed out that the definition given was not an exact one or the sole guide by which such disability is to be determined, still the authority of the Director in the matter was recognized.

It would seem that the Government's complaint here is really that the Director has erred in exercising his power of definition by including loss of hearing; and since there is no claim that the Director abused his power, we believe the matter is not open to the attack made, which in fact amounts to a question of the exercise of the power given, rather than presenting a question of lack of power to exercise such discretion.

Respondent, from the entire record, is clearly in a state of total and permanent disability for all practical purposes because one in his condition as a practical matter would have great difficulty in getting a job, and greater difficulty in holding it, even if he could afford the expense of $10.00 or $12.00 per day of operating the ear phone, and without that, the record is undisputed that he could not hear, and even with that, he cannot hear but very imperfectly.

Cases of disability by reason of loss of hearing are not numerous, but we refer to:

McCutcheon vs Pacific Mutual Life Insurance Co, (S. C.) 151 S. E. 67;

Kane vs Metropolitan (Mo.) 73 S. W. (2d) 826.

On the whole, we submit that paragraph 11 (a) is a reasonable and practicable provision and that its provisions are

within the intent and purpose of the law, and within the power of the Director to prescribe the terms of the insurance, and hence is valid.

Furthermore under 38 U. S. C. (Supp), Section 11e (b) being Act of July 3rd, 1930, 46 Stat. 1018, which is the Act authorizing consolidation of former Veteran functions into the Veterans Administration, it is provided:

> "All orders, rules, regulations, and permits or other privileges, issued or granted in respect of any function consolidated under the provisions of this Act and in effect at the time of the consolidation, shall continue in effect to the same extent as if such consolidation had not occurred, until modified, superseded, or repealed by the Administrator."

Since the policy in suit, with Paragraph A therein had been issued prior to this Act, and since there is no claim that Paragraph A has ever been modified or superseded by the Administrator, it would seem that the above Act would be sufficient to amount to an express adoption of said paragraph.

We, therefore, submit that the paragraph in question is valid.

C. Repeated re-enactment of the Statute relating to converted insurance, without change therein insofar as total and permanent disability is concerned, amounts to legislative consent to the policy issued by the Director.

Since the inception of congressional action relating to this insurance by the Act of October 6th, 1917, the provisions appearing in Sections 402 and 404 of that Act have been substantially re-enacted (except as to the time specified for conversion) on many occasions, as appears from the list of the Acts, Note 7, page 11, Petitioner's Brief; and those sections (being now 38 U. S. Code, Section 512) not having been changed except as to conversion date, and the converted insurance policy having at all times contained Paragraph 11 (a), it is submitted that Congress has in any event given its consent to such paragraph, even if it should be held that

originally it was not within the province of the Director.

The petitioner in its petition for certiorari, pp. 12-13, says that such clauses are contained in all Government life insurance policies now outstanding which, at the close of the fiscal year 1934, numbered nearly six hundred thousand.

The question, therefore, is one of great importance, not only to respondent, but to the other six hundred thousand who have paid premiums for their policies and acquired what they undoubtedly thought were valid rights thereunder.

In Studebaker vs Perry, 184 U. S., at 269: 46 L. Ed. at 533, a case in which the doctrine now invoked was not found applicable, it was said:

> "but its application should be restricted to cases in which the construction involved is really one of doubt and where those to be affected have relied on the practical construction, and rights have accrued by reason of such reliance."

In Mass. M. L. Ins. Co. vs U. S., 288 U. S. at 272, 77 L. Ed. at 742, it is said:

> "If the legislative body had considered the Treasury interpretation erroneous it would have amended the section. Its failure so to do requires the conclusion that the regulation was not inconsistent with the intent of the statute (cases cited) unless, perhaps, the language of the act is unambiguous and the regulation clearly inconsistent with it." (Cases cited.)

In Norwegian Nitrogen Prod. Co. vs U. S., 288 U. S. at 313: 77 L. Ed. at 806, it is said:

> "Acquiescence by Congress in an administrative practice may be an inference from silence during a period of years."

In National Lead Co. vs U. S., 252 U. S. at 146, 64 L. Ed. at 499, with reference to a statute re-enacted four times, it is said that such,

> "amounts to an implied legislative recognition and approval of the executive construction of the Statute."

Similar holdings are found in:

Murphy Oil Co vs Burnett, 287 U. S. at 302: 77 L. Ed. at 322;
Old Colony R. C. vs Commission, 284 U. S. at 557: 76 L. Ed. at 487;
Federal Land Bank vs Warren, 292 U. S. at 55: 78 L. Ed. at 1121;
Burnett vs Thompson Oil & Gas Co, 283 U. S. at 307: 75 L. Ed. at 1054;
Brewster vs Gage, 280 U. S. at 337: 74 L. Ed. at 463;
U. S. vs Farrar, 281 U. S. at 634: 74 L. Ed. at 1081;
U. S. vs Jackson, 280 U. S. at 197: 74 L. Ed. at 368.

The policy in suit, containing paragraph 11 (a), is dated June 13th, 1927 (R. 15-24) and respondent has regularly paid all premiums thereon and according to the Government's statement in the petition for certiorari, p. 12, all outstanding Government life insurance policies contain said paragraph and number nearly six hundred thousand, and there is continuing authority to issue others in U. S. C., Title 38, Sec. 512-a.

The law from its inception has provided for the insurance,

"against the death or total permanent disability,"

as it now appears in Section 511, Title 38, U. S. C. And the provisions respecting the character and terms of the insurance have been practically identical since the inception of this insurance and, as now appears in Section 512, Title 38, U. S. C., though on a number of occasions that section has been re-enacted to change the time limit for conversion of the insurance.

Congress evidently was cognizant of the terms and conditions of the insurance, as by Section 512-b, Title 38, U. S. C., it provided for the addition of a presumptive total disability clause when one had been disabled for only four months, but in connection with that legislation did not take any action with respect to the existing policy which evidently had been issued and used in its present form since insurance was first authorized and issued. And the law has been re-enacted in practically identical words, both before the issuance of re-

spondent's policy, as well as afterwards, but Congress, evidently knowing of the form of the policy, or if not, being charged with notice thereof, has not seen fit to say that paragraph 11 (a) is wrong nor prohibited it.

We submit that since nearly six hundred thousand have acquired rights under the policy as drawn, containing paragraph 11 (a), and since it is a reasonable and practicable provision, similar to that found in numerous company policies, and since it has been acquiesced in by Congress for so long a period, that in any event under the doctrine now urged the policy should be upheld as valid.

D. The Miller Case, 294 U. S. 435, is not applicable.

The real point decided in the Miller Case, 294 U. S. 435: 79 L. Ed....., was that it was not permissible for the assured under Government term insurance to derive benefit from and have applied a regulation of the Director adopted eleven years after the policy there involved had lapsed. Furthermore, in that case the policy did not contain the presumptive clause, but the benefit of a regulation made eleven years after the policy lapsed was sought to be applied, whereas in our case the policy itself contains the presumptive clause, which according to the Government has been in all such policies of converted insurance.

In the Miller case there could have been no approval of the regulation on the doctrine of practical executive construction because the regulation involved there was issued in May, 1930, and the claim was made in June, 1931, therein, and suit was brought in April, 1932. Whereas in our case the doctrine is available because the clause is certainly not prohibited by the law and has been in use for many years, under which the rights of some six hundred thousand have been acquired, and by its re-enactment of the law Congress is presumed to have acquiesced in the clause, if in fact it was not within the province of the Director to make. And as to this we insist

that since Congress has throughout drawn a distinction between term insurance and converted insurance, that it was within the power of the Director to adopt the clause in question, which is both reasonable and practicable.

We, therefore, respectfully submit that the judgments below should be affirmed.

WHEREFORE, respondent prays that the judgment of the Circuit Court of Appeals be affirmed.

Respectfully submitted,

A. H. CULWELL,
JOHN M. WORRELL,
R. A. D. MORTON,
Attorneys for Respondent

December, 1935.